



INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1221]

Certain Electronic Stud Finders, Metal Detectors and Electrical Scanners; Notice of a Commission Determination to Review in Part a Final Initial Determination Finding No Violation of Section 337; Schedule for Filing Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the Administrative Law Judge's ("ALJ") final initial determination ("ID"), issued on October 7, 2021, finding no violation of section 337 in the above-referenced investigation as to three asserted patents. The Commission requests briefing from the parties on certain issues under review. The Commission also requests briefing from the parties, interested government agencies, and other interested persons on remedy, the public interest, and bonding, as indicated in this notice.

FOR FURTHER INFORMATION CONTACT: Benjamin S. Richards, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 708-5453. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: On October 5, 2020, the Commission instituted this investigation based on a complaint filed on behalf of Zircon Corporation of Campbell, California ("Zircon"). 85 FR 62758-59 (Oct. 5, 2020). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain

electronic stud finders, metal detectors, and electrical scanners by reason of infringement of one or more claims of U.S. Patent Nos. 6,989,662 (“the ’662 patent”), 7,148,703 (“the ’703 patent”), 8,604,771 (“the ’771 patent”), and 9,475,185 (“the ’185 patent”). *Id.* at 62759. The Commission’s notice of investigation named as respondents Stanley Black & Decker, Inc. of New Britain, Connecticut, and Black & Decker (U.S.), Inc. of Towson, Maryland (together, “Respondents”). *Id.* The Office of Unfair Import Investigations is not participating in this investigation. *Id.*

On April 22, 2021, the ALJ issued a claim construction order based on briefs submitted by the parties. *See* Order No. 20. On June 15, 2021, the ALJ granted a motion for summary determination of no infringement concerning the ’703 patent, which terminated that patent from the investigation. *See* Order No. 27, *unreviewed by* Comm’n Notice (July 15, 2021).

On October 7, 2021, the ALJ issued the subject ID on violation, which found no violation of section 337 as to any claim of the remaining asserted patents by Respondents. Also, on October 7, 2021, the ALJ issued his recommended determination (“RD”) on remedy and bonding. The ALJ recommended, upon a finding of violation, that the Commission issue a limited exclusion order and impose a bond in the amount of zero percent of the entered value of any covered products imported during the period of Presidential review.

On October 19, 2021, Zircon and Respondents submitted petitions for review of the ID. On October 27, 2021, Zircon and Respondents submitted responses to the petitions.

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID with respect to (1) the ID’s infringement findings for the ’662 patent; (2) the ID’s findings on the technical prong of the domestic industry requirement for the ’662 patent; (3) the ID’s obviousness findings for the ’662 patent; (4) the ID’s infringement findings for the ’771 patent; (5) the ID’s anticipation and obviousness findings for the ’771 patent; (6) the ID’s claim construction and infringement findings for the ’185 patent; (7) the ID’s anticipation and obviousness findings for

the '185 patent; and (8) the ID's findings on the economic prong of the domestic industry requirement. The Commission has determined not to review the remainder of the ID.

In connection with its review, Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

1. The ID found that the "calibration value" obtained during the calibration mode of claim 1 of the '662 patent must be a reference value for future measurements. Explain why or why not the [redacted] value in the accused products is a reference value for either a [redacted] value or a [redacted] value in those products. Include in your answer an explanation of whether [redacted] values and/or [redacted] values are "future measurements" as that phrase is used by the ID.
2. Was the issue of whether the [redacted] value is a reference value for either [redacted] values or [redacted] values raised before the presiding ALJ? Provide citations to the record identifying all such places where that issue was presented to the ALJ.
3. If the Commission finds that the [redacted] value in the accused products practices the "calibration value" limitation of claim 1, what effect, if any, would that finding have on the remainder of the ID's findings?
4. Claim 12 of the '662 patent includes the limitation "a comparator adapted to compare the first memory location to the second memory location, thereby determining if the calibration value represents a value sensed over or near the stud, wherein the comparator is operationally coupled to the first and second memories." Within the meaning of that limitation, are the values [redacted] in the accused products stored in either of the claimed "first memory location" or

“second memory location”? Support your answer with citations to record evidence.

5. Zircon asserts, through its expert’s testimony, that the [redacted] is a comparison of the claimed first and second memory locations. Identify all record evidence supporting or undermining the conclusion that the value [redacted] is stored in the claimed first or second memory location.
6. Identify any evidence of record, whether direct or circumstantial, that shows that Respondents intended to induce their customers to infringe the ’622 patent through use of the accused products. Indicate, with citations to the posthearing briefing, whether any evidence of intent you identify was presented to the ALJ.
7. Identify any evidence of record establishing that Respondents possessed a good-faith belief that the users of their accused products did not infringe the ’622 patent through use of those accused products. Indicate, with citations to the posthearing briefing, whether any evidence of such a good faith belief was presented to the ALJ.
8. Does the record of this investigation include any findings on the level of ordinary skill in the art with respect to the ’662 patent? Identify where in the record any such findings are located. If the record does not include findings on the level of ordinary skill in the art with respect to the ’662 patent, explain what the level of ordinary skill art for the ’662 patent is. Include any citations to record evidence that support your explanation.
9. Explain whether Respondents have shown that the asserted claims of the ’662 patent are obvious according to the analysis laid out in *KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). Address specifically the effect of the level of ordinary skill in the art for the ’662 patent on that analysis.

10. In the context of the '771 and '185 patents, does the evidence of record support the conclusion that the top edge of the Zircon 1 prior art device resists rotational movement of the device, or does not resist rotational movement of the device, when held by a user? Identify the evidence of record that supports your position.
11. Claim 14 of the '185 patent includes the term “gripping means.” Did the parties agree to construe that term as a means-plus function term? If the parties did so agree, what is the term’s corresponding function and what is the clearly linked structure in the specification? If the parties did not so agree, what construction, if any, did the parties propose for this term? Identify where in the record, if anywhere, the parties addressed the construction of this term. If the parties did not previously propose a construction for this term, how should it be construed? If you contend that it should be construed according to its plain and ordinary meaning, identify what that plain and ordinary meaning is.
12. Please describe with particularity and citation to the record the activities for which Zircon claims expenditures in: (a) plant and equipment, (b) labor or capital, and (c) research and development related to exploitation of the patents at issue. Please provide these values separately for each patent that complainant alleges protects its DI products. Identify where in the record, if anywhere, these activities were presented to the ALJ in support of Zircon’s domestic industry contentions.
13. Please state the metric(s) or method(s) by which Zircon seeks to establish that its expenditures falling under section 337(a)(3)(A), (B), and (C) are significant or substantial, in relation to the DI products protected by each patent and state why these measures provide an appropriate basis for assessing whether the claimed expenditures constitute “significant” or “substantial” investments in plant and equipment, labor or capital, and/or R&D in the United States. Please

cite relevant Commission precedent as applicable. Identify which of these bases for assessing whether Zircon's investments are "significant" or "substantial" were presented to the ALJ and which, if any, were not. For arguments presented to the ALJ, include citations to the posthearing briefing where those arguments were raised. For arguments not presented to the ALJ, explain whether those arguments could have been presented to the ALJ.

14. Does the evidence of record support the cost of goods analysis Zircon presents in its petition for review?
15. Discuss cases where the Commission and/or the Federal Circuit have included, as part of a domestic industry's investments in plant and equipment, labor or capital and exploitation of a patent or other IP right, the complainant's expenditures related to sales, marketing, and/or administrative expenditures and cases where they have not. Please explain whether and why the Commission should or should not consider Zircon's sales, marketing, and/or administrative expenditures in this investigation.
16. Do the activities Zircon conducts in the United States support the conclusion that it is more than a "mere importer"?
17. How much R&D does Zircon conduct abroad relating to (a) the asserted patents and (b) the DI products that Zircon alleges are protected by each asserted patent? What portion of total R&D in these categories are conducted in the United States? How, if at all, does this support the existence of a domestic industry in the United States.
18. Is there a nexus between Zircon's investments in research and development and each of the three remaining patents asserted in this investigation? Identify where, if anywhere, in the posthearing briefing before the ALJ this issue was addressed.

19. Does section 337(a)(2)-(3) require a patent-by-patent analysis of the significance or substantiality of a complainant's domestic industry investments and activities? Identify any precedents from the Commission and/or from the U.S. Court of Appeals for the Federal Circuit that support your position.

20. Concerning the economic prong of the domestic industry requirement, did Zircon advance a patent-by-patent analysis of the significance or substantiality of its investments for each of the asserted patents before the ALJ? Did the ID conduct such a patent-by-patent analysis? Provide any citations to the posthearing briefing before the ALJ and to the ID that support your answer.

The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (Dec. 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are

like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainant is also requested to identify the remedy sought and Complainant is requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on December 20, 2021. Reply submissions must be filed no later than the close of business on January 3, 2022. Opening submissions are limited to 150 pages. Reply submissions are limited to 150 pages. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR

210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1221) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on December 6, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR 210).

By order of the Commission.

Issued: December 6, 2021.

Lisa Barton,
Secretary to the Commission.

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